SUPREME COURT, U. S.
DEC 20 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 885

ADELAIDE M. BRAUER and PRESTON HOWARD,
Petitioners,

v.

CITY OF CLEVELAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—SUPREME 6-1966

TABLE OF CONTENTS.

Citations to Opinions Below ---------- 1

Jurisdiction ---------- 2

Questions Presented ---------- 3

Constitutional Provisions, Statutes, City Charter and Court Rules Involved ---------- 4

Statement of the Case ---------- 5

Reasons in Support of Petition ---------- 13

Appendix:

A. *Adelaide M. Brauer v. City of Cleveland, et al.*, Opinion and Judgment of the Supreme Court of Ohio, July 6, 1966 ---------- 17

B. *Preston Howard et al. v. City of Cleveland et al.*, Opinion and Judgment of the Court of Appeals, Cuyahoga County, July 17, 1964 ---------- 19

C. Order of the Supreme Court of Ohio, July 6, 1966, *Brauer v. City of Cleveland, et al.*, No. 39,933 ---------- 26

Order of the Supreme Court of Ohio, July 6, 1966, *Howard v. City of Cleveland, et al.*, No. 40,155 ---------- 26

Orders on Denial of Rehearing ---------- 27

D. Constitution of the United States, Amendments 5 and 14 ---------- 27

E. Ohio Constitution, Article II, Section 1 ---------- 28

F. Relevant Sections of the Ohio Revised Code ---------- 29

G. Relevant Sections of the Charter of the City of Cleveland ---------- 31

H. Supreme Court of Ohio Rules of Practice ---------- 33

TABLE OF AUTHORITIES.

Cases.

Neal v. Delaware, 103 U. S. 370 13

State ex rel. Foster v. Evatt, Tax Comr., 144 O. S. 65, 56 U. S. 2nd 265 15

State ex rel. Stoll v. Gottlieb, 305 U. S. 165 15

Truax v. Corrigan, 257 U. S. 312 13

Virginia v. Rives, 100 U. S. 313 13

Constitutions.

Constitution of the United States:

Amendment 5 ..... 4, 13, 27

Amendment 14, Sec. 1 ..... 4, 13, 27

Constitution of Ohio:

Art. II, Sec. 1 ..... 4, 13, 28

Statutes.

Ohio Revised Code:

Sec. 733.56 ..... 2, 5, 10, 29

Sec. 733.57 ..... 2, 5, 9, 10, 11, 29

Sec. 733.58 ..... 2, 5, 9, 10, 11, 29

Sec. 733.581 ..... 2, 5, 29

Sec. 733.59 ..... 2, 5, 10, 30

Sec. 733.60 ..... 2, 5, 30

Sec. 733.61 ..... 2, 3, 5, 10, 14, 15, 30

Sec. 2505.29 ..... 4, 5, 31

28 U. S. C. 1257(3) 2

City Charter.

Charter of the City of Cleveland, Chapter 15:

Sec. 87 ---------- 5, 31
Sec. 88 ---------- 5, 31
Sec. 89 ---------- 5, 32
Sec. 90 ---------- 5, 32
Sec. 92 ---------- 2, 5, 32

Rules.

Rules of Practice of the Supreme Court of Ohio, Rule II, Secs. 9 and 10 ---------- 4, 5, 12, 33

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ADELAIDE M. BRAUER and PRESTON HOWARD,

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v.

CITY OF CLEVELAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

Adelaide M. Brauer and Preston Howard, the petitioners herein, pray that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio, entered in the above causes on July 6, 1966 and in which the Motions for a rehearing timely filed, were overruled on September 28, 1966.

CITATIONS TO OPINIONS BELOW.

The opinion of the Supreme Court in the Brauer case is reported as 7 Oh. S. 2nd 94 and appears in the preliminary report of the N. E. reporter of August 24, 1966, such being known as 218 N. E. 2nd, Number 4, pages 489-648. The case is there known as 218 N. E. 2nd 599. A copy of that opinion as there reported is set forth in Appendix A at page 17.

The present Howard case was not reported. The Howard case on a previous appeal in which the same questions were determined was reported in 9 Oh. Law Abs.

304, 200 N. E. 2nd 349, Appendix B, page 19. In that case the Supreme Court refused a Motion to certify and permit consideration of the case on its merits by that Court.

Petitioners' request for rehearings was denied by the Supreme Court without opinion.

JURISDICTION.

The judgments of the Supreme Court of Ohio reversed the judgment of the trial Courts, and the judgments of the Ohio Court of Appeals of the 8th district of Ohio.

The Common Pleas Court decision granted judgments in favor of the petitioners for attorneys' fees as provided both by statutes, Ohio Revised Code 733.56 to 733.61 (especially O. R. C. 733.61) Appendix F, page 29 and the Charter of the City of Cleveland (Sec. 92, Cleveland Charter) Appendix G, page 32. The trial Court rendered the judgments without opinion. The Court of Appeals confirmed without opinion. The Supreme Court reversed the decisions on July 6, 1966 and overruled the Motion for rehearings on September 28, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

The questions presented, expressed on the terms and circumstances of the case may be presented as follows:

1. May a court rewrite the provisions of a state statute (O. R. C. 733.61), Appendix F, page 30, enacted for the protection of the ordinary taxpayers by interpreting a clear and unambiguous statute in such a manner as to include conditions not therein set forth which conditions would permit its use to one class of citizens and deny its use to another group or class of citizens and, in effect, deny such citizens the equal protection of the law?

2. May a court deny the Petitioner Brauer and the group which she represents the equal protection of the laws enacted for the purpose and use of all taxpayers for preventing the abuse of municipal powers, because she and the group she represents are only a small percentage of the taxpayers who are being illegally charged for licenses under an arbitrary act of a municipal official which act the courts had held was arbitrary and capricious and illegal and an abuse of corporate power of the municipality?

3. Is not a judgment granted under a legal statute, property in the eyes of the law, and is not the attempt of the Ohio Supreme Court to legislate conditions into the statute which do not exist there and which thereby nullify the judgment constitute the taking of property without due process of law?

4. Does not the abrogation of the power of a citizen to demand legal government and the equally important right to prevent illegal government a civil right which belongs to all people, and, is not the denial of such a right to any one person, or a small group of citizens, an abrogation of that group's civil rights as provided in both the Ohio Constitution and the Constitution of the U. S.?

5. Does not the judgment of a court which changes the conditions and provisions of a clear and unambiguous statute constitute legislating; and is not such a judgment an abrogation of the safeguarding provisions of both the United States and Ohio Constitutions which provide for and make mandatory the checks and balances of a tripartite form of government established for the welfare of the State and the protection of the ordinary citizen; his rights and his property?

In the Howard case all the previous questions were raised as previously set forth in addition to the following:

6. May the Ohio Supreme Court, on a Motion filed for the sole purpose of requesting the Court to accept jurisdiction, reverse the judgment of the trial court and the Court of Appeals, without hearing the case on its merits as provided by Statute and rules of Court (Ohio Revised Code Section 2505.29) Appendix F, page 31 and Rules of Supreme Court, Rule II Sections 9 and 10, Appendix H, page 33, and does not such decision nullifying or reversing a judgment on a preliminary motion to certify constitute the taking of property without due process of law, and abrogate the due process requirements of the 5th and 14th Amendments to the Constitution of the United States? (Appendix D, pages 27 and 28.)

CONSTITUTIONAL PROVISIONS, STATUTES, CITY CHARTER AND COURT RULES INVOLVED.

The relevant provisions of the federal and state constitutions, state statutes, city charter provisions and rules of practice of the Supreme Court of Ohio are set forth in the appendix hereto (pp. 27-33), as follows: Constitution of the United States, Amendments 5 and 14, Appendix D; Constitution of Ohio, Article II, Section 1, Appendix E;

Ohio Revised Code; Sections 733.56 to 733.61, incl., and Section 2505.29, Appendix F; Charter of the City of Cleveland, Chapter 15, Sections 87 to 90, incl., and Section 92, Appendix G; Rules of Practice of the Supreme Court of Ohio, Rule II, Sections 9 and 10, Appendix H.

STATEMENT OF THE CASE.

The State of Ohio has enacted statutes requiring the city solicitor or director of law of a municipality, inter alia, to restrain the misapplication of municipal funds, to prevent the abuse of municipal corporate powers, to enforce the contractual rights of the city and to bring mandamus actions to compel the municipal officers to carry out their statutory duties when they fail or refuse to carry out these duties. (Ohio Revised Code Sections 733.56 to 733.61, Appendix F, pages 29-30.)

These statutes provide that any taxpayer may request the director of law, in writing, to bring such an action if the director fails to do so of his own accord. The statutes further provide that in the event that the director of law fails or refuses to bring such an action upon written request, the taxpayer himself may bring the action on behalf of the municipality and other taxpayers. If the taxpayer is successful in his suit, i.e., if he does what the solicitor should have done, and successfully proves an illegal act by or against the municipality, he may be awarded reasonable attorney's fees as part of the costs at the discretion of the court for having carried out the public function of the law director which the law director, himself, failed to do.

In the Brauer case the petitioner, along with many other citizens and taxpayers, owned what is known as a Row House, as defined by the Building Code of the

City of Cleveland. Under the code, the row houses were in separate category from "Multiple Dwellings" and were not required to have custodians or supply other multiple dwelling services. They were also not required to be licensed as multiple dwellings. The Cleveland Commissioner of Housing arbitrarily determined that these houses were multiple dwellings and required them to provide custodial service, conform to stricter building requirements and obtain multiple family licenses not required of row houses or one or two-family rental properties. Such licenses were required to be obtained by the owners prior to offering the property for rent under threat of arrest. This determination by the Commissioner of Housing was a purely personal act on his part, totally devoid of any foundation in the form of an ordinance or resolution of the City Council.

The mandatory requirements placed on Row Houses by the Housing Commissioner which required custodians, additional services and license fees was an abuse of his powers and would have constituted retroactive legislation if it had been enacted by Council. The illegality of the Commissioner's action was easiest to test by objecting to the license fees for apartment houses being applied to row houses. It obviated collateral questions as to the need of custodians, etc. If the court determined that the license fee was illegal, it would determine, ipso facto, that row houses were not susceptible to the more onerous and retroactive requirements for multiple dwellings.

The petitioner requested the Director of Law to bring an action under the aforesaid taxpayer's statutes to enjoin the Building Commissioner from imposing the illegal license fee requirements. The Director refused, and the petitioner, herself, was forced to bring the action. She was successful. The court held that the Cleveland Commis-

sioner of Housing was acting illegally, that his action was beyond the scope of his authority and constituted an abuse of corporate power. It enjoined the city from collecting the license fees previously demanded under threat of arrest, and also restrained the city from interfering with the renting of row houses.

Subsequent to the successful termination of the taxpayer suit, in accordance with the custom established ever since the enactment of the original statutes in 1868, a hearing was held on an application for a judgment of attorney's fees to be assessed as part of the costs of a successful taxpayers action. The trial court, at this hearing, awarded the sum of $4,990 to the successful taxpayer for her attorneys' fees as part of the costs of the action.

It is further significant that the Director of Law in none of his assignments of error to the Court of Appeals complained that the action was not a proper subject for a taxpayer's suit. Thus the matter was not before the Court of Appeals nor was it properly before the Supreme Court. Absent an appeal from the decision by the Court of Appeals on the merits of the original case, the matter as to the propriety of this action as a proper taxpayer's suit was res judicata. It was not until the Director of Law appealed the judgment awarding attorney's fees to the taxpayer as part of her costs, to the Supreme Court of Ohio that the issue as to the propriety of this action as a taxpayer's suit was raised. As a matter of fact, it was the Supreme Court and not the respondents which raised the issue as shown by the following quote from the decision of the Supreme Court:

> "We observe that the rights protected were private rights as opposed to public rights. The action filed was primarily for the benefit of the plaintiff's own interests. No public money or property is involved.

> The sole purpose of the action was to prevent the municipality from requiring payment of fees by a limited class of property owners, of which plaintiff is a member."

In the Brauer case, during the argument before the Supreme Court, great stress was laid by the Director of Law on the fact that this illegal act only involved 6000 or 7000 housing units in the whole city of Cleveland and that the petitioner represented an even smaller number of taxpayers. Under the statutes in question, any one taxpayer may and has brought actions to maintain legality and prevent illegality in municipal government. No conditions or restrictions are contained in the statute as to the number of owners who must be represented in a taxpayers' actions brought under the protective provision of the statute.

It is apparent from the wording of the decision rendered by the Supreme Court of Ohio, that it was this argument of the comparatively small number of 6000 or 7000 housing units involved which influenced the Court to attempt to legislate a condition into the statute providing for a limitation of a judgment for attorneys' fees to be assessed as part of the costs which did not exist in the statute. This is clearly borne out by the language of the opinion of the Supreme Court which in part is as follows as shown in Appendix A, page 18.

> "The sole purpose of the action was to prevent the municipality from requiring payment of fees by a limited class of property owners of which the plaintiff is a member."
>
> "It would be inequitable to pay the plaintiff's counsel with public funds in a case in which the public obtains no benefit."

The Court includes additional limitations and provisions not included in these protective taxpayers statutes:

> "In the instant case, we find other circumstances present which were apparently not considered by the Court at the time of the hearing in this matter and which should always be considered when the discretionary matter of the allowance of fees is reached. We observe that the rights protected were private rights as opposed to public rights. The action filed was primarily for the benefit of the plaintiff's own interests. No public money or property is involved. The sole purpose of the action was to prevent the municipality from requiring payment of fees by a limited class of property owners, of which plaintiff is a member."
>
> "The statute which allows fees directs the court to make such order as the equity of the case demands."

The Court, in its opinion, attempted to legislate a condition into the statute whereby the Court could only render a judgment for attorney fees when public money or property was involved. If the taxpayers action is brought under Ohio Revised Code Sections 733.57 or 737.58, Appendix F, page 29, no public money or property can be involved. Nevertheless, the legislature made no such exemption in the statutes, and provided for attorneys fees in all these cases.

The Court also seemed to decide that a taxpayer representing a small number of taxpayers and a comparatively small amount of property did not have the same civil and constitutional rights as a taxpayer representing a large number of taxpayers under taxpayer's statutes enacted for the protection of all citizens and their property, and for the continuation of orderly and legal municipal government. But not only were the petitioner's civil rights

abrogated in this decision, but the petitioner's property, i.e., the judgment for attorney's fees, was taken away from her without due process of law and contrary to constitutional provision.

Clearly, in many cases brought under those Sections, these actions would not, and frequently could not, be concerned "with public money or property." Yet, despite that fact, the legislature in Section 733.61 Appendix F, page 30, clearly permitted an allowance for attorney's fees in this type of case. It is evident, therefore, that the legislature intended no such conditions as imposed by the Court.

Ohio Revised Code Section 733.59 authorized a taxpayer to bring the action, if the solicitor failed or refused to do so. In Ohio Revised Code Section 733.61, the legislature specifically and clearly made provision for the allowance of attorney's fees to the successful taxpayer in such cases brought for the protection of the class which the taxpayer represented.

A reading of the statutes (Sections 733.56, 733.57 and 733.58) Appendix F, page 29, where the taxpayer is authorized by the legislature to sue if the solicitor fails or refuses to do so, makes it abundantly clear that there are many instances where no fund could possibly be created nor could public money or property be involved.

It is the contention of the petitioner that, by its decision, the Court attempted to revise the provisions of the taxpayer's statutes by further restricting the safeguarding provisions of those statutes to those cases "where public money or property is involved." This is clear from the following statement found in the opinion Appendix A, page 18.

> "The action filed was primarily for the plaintiffs own interests. No public money or property is involved."

The petitioner contends that even a casual reading of the statutes clearly indicates that no such restrictions could possibly have been intended, nor can such a restriction be possible under these safeguarding statutes. Under some of these statutes, there is only a remote possibility that "public money or property" could be involved. These are the mandamus or specific performance provisions.

The petitioner contends that great benefits are derived by the public as a whole when a government of laws and not of men is maintained in a democracy. It is evident that the legislature shared this view when it enacted Ohio Revised Code Section 733.58, providing for an action in mandamus by the solicitor to force public officials to carry out their statutory duties. This is likewise true of Ohio Revised Code Section 733.57 which provides for a taxpayer bringing an action for specific performance "when an obligation or contract * * * granting a right or easement or creating a public duty is being evaded or violated * * *."

The Howard case is similar to the Brauer case in that it also involves the nullifying of a judgment rendered in a taxpayer's action. It also involves the questions of the denial of equal protection of the laws and the taking of property without due process of law.

The Howard case goes one step further in a denial of due process in the following manner, i.e., judicial process as provided by constitution, statute and the courts own rules. The Howard case was an appeal from a judgment of the trial Court allowing attorney's fees rendered in a taxpayer's action. It involved over 1100 taxpayers who were illegally assessed penalties for the repair of sidewalks by the City of Cleveland. The Court held that the assessment of such penalties was illegal and unconstitutional and enjoined the city from attempting to collect them.

The trial Court adjudged attorney's fees in favor of the taxpayer, and ultimately this matter was appealed by respondents to the Supreme Court of Ohio on a Motion to certify. This is a Motion filed solely for the purpose of determining whether or not the Supreme Court will hear the case on its merits. Despite the statutory provision and the rules of the Supreme Court, as found in Appendix H, page 33, Supreme Court reversed the decision of the trial Court and the Court of Appeals of the 8th District of Ohio without trial, i.e., hearing the matter on its merits.

The Brauer decision as indicated by the opinion of the Court was a factual decision. It is difficult to determine how the same set of facts would apply to the Howard case. In the Howard case all property owners of the City of Cleveland might be affected by the illegal penalties and assessments which could be enforced against them at one time or another under a penalty ordinance which was declared to be illegal and unconstitutional.

Under such circumstances the Howard case could not, therefore, be considered as a matter involving "a limited class of property owners." Under such circumstances the right of judgment for attorney's fees for a limited class of property owners under the Brauer limitations, if such were legal, could not possibly apply in the Howard case, since eventually all property owners could and would be benefited by preventing the illegal penalties imposed under the ordinance.

REASONS IN SUPPORT OF PETITION.

The decision of the Ohio Supreme Court flagrantly violates the rights of the petitioners which are guaranteed by these provisions of the United States Constitution. In part they are as follows:

> "The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives * * *. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."
>
> Article II, Section 1, Ohio Constitution, Appendix E, page 28.

> "No person shall * * * be deprived of life, liberty or property without due process of law. * * *"
>
> V Amendment of the Constitution of the United States, Appendix D, page 27.

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> XIV Amendment Section I of the Constitution of the United States, Appendix D, pages 28-29.

The inhibition against denial of equal protection of the laws is imposed on every agency of the State whether executive, legislative or judicial (*Virginia v. Rives*, 100 U. S. 313, 318).

The denial of the equal protection of the laws is also violated by the withholding of equal access to the Court (*Truax v. Corrigan*, 257 U. S. 312) or by denial of equality of treatment in the Courts. (*Neal v. Delaware*, 103 U. S. 370.) The discrimination between the representations of large numbers of citizens being granted a judg-

ment for costs and a small number of people being prevented from obtaining a judgment for costs is indeed such a discrimination as denies the equal protection of the laws. If the decision of the Court were to be followed, the one group is given a sword with which to protect itself while the other is given a useless and empty scabbard. The vital importance of maintaining the equal protection of the taxpayers' statutes in question is obvious. In refusing the equal protection of those laws to the very people for whom the protection was intended, is to strike a blow at the very essence of a democratic state—the protection of the poor and the weak against the mighty and strong. These statutes were not enacted for the purpose of protecting the rich. They can finance their own taxpayers' actions and need no protection. These statutes were enacted for the purpose of protecting the little people, such as our petitioner Brauer who owns six small row housing units and Howard, whose small sidewalk was involved. It is these people, who do not have the money or the power to protect themselves against public officials with a law department and unlimited funds to protect their illegal acts, for whom these protective laws were enacted. These little people, unlike public officials, do not have a law department supported by public tax funds at their beck and call. How can the little person, who is unlawfully charged $15.00 for his license, or is overcharged $34.34 as an illegal penalty for his sidewalk repair, fight City Hall all the way up to the Supreme Court? He can't and that is why the Ohio legislature gave him the clear, unambiguous protective provisions of Section 733.61 of the Revised Code which have stood him in good stead until the Supreme Court of Ohio took them away. The refusal of the equal protection of these laws to the little people, or a small group of little people, is to strike at the very foundation

and purpose of a democratic state, namely, equal justice under the law.

It is the petitioners' contention that the Court went beyond its authority under the rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statutes in question especially Ohio Revised Code Section 733.61, to meet a situation not provided for in the statute. It is the petitioners' contention that this is a clear denial of the due process of law provision (*State ex rel. Foster v. Evatt, Tax Comr.*, 144 O. S. 65, 56 U. S. 2nd 265) and (*State ex rel. Stoll v. Gottlieb*, 305 U. S. 165). The State Courts have supported the petitioners at every stage of the proceeding until they came to the Court of Last Jurisdiction. The petitioners, therefore, have been denied their rights by the Supreme Court and, of necessity, must seek the remedy and the protection of their rights under the constitution of the United States by filing a petition for a writ of certiorari to the Supreme Court of the United States.

There is an old saying which is frequently only too true, "You can't fight City Hall." However, the Ohio legislature provided the ordinary citizen with a sword with which to defend his rights, his property and his democratic form of government. From self serving public servants the only condition which the statute imposes is that he be upheld by the Courts in his claim of illegality or action in mandamus, or action for specific performance. The decisions in question, legislating conditions and provisions into the statute, contrary to its provision as enacted by the legislature, will take away the citizen's and the little man's rights and have already taken away the property and the rights of the petitioners without due process of law, and by the same decisions have denied them equal protection of the laws.

Petitioners respectfully request that a writ of certiorari issue herein and that this cause and the fundamental questions which it presents be assumed by this Court.

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APPENDIX A.

Adelaide M. Brauer v. City of Cleveland, et al., Opinion and Judgment of the Supreme Court of Ohio, July 6, 1966.

Per Curiam. Although taxpayers' suits are recognized in equity, there is no authority for the allowance of attorney fees as costs in such cases unless a fund is created or preserved. 5 A. L. R. 2d 874, 877.

Section 733.61, Revised Code, specifically authorizes that fees be allowed plaintiff's counsel and taxed as costs if judgment is finally ordered in plaintiff's favor in an action brought for an injunction when the city has refused to file the action after being requested to do so (Section 733.59, Revised Code). That statute does not require that a fund be either created or preserved as a prerequisite to an allowance of fees.

If an action might have been filed by the city solicitor his refusal to do so clearly gives a derivative action to a taxpayer. It is reasonably arguable that Section 733.61, Revised Code, may permit the fee of plaintiff's counsel to be allowed and taxed as costs without regard to a fund.

The threatened acts constitute an abuse of corporate power, and the Director of Law was given authority to file such an action by Section 733.56, Revised Code.

There is no denial that the plaintiff made the request required by the statute, and that action by the Director of Law was refused.

This court's holding in *State, ex rel. Scott, v. Masterson,* 173 Ohio St. 402, does not lay down the rule that counsel fees cannot be allowed to a taxpayer unless a fund has been created or preserved. It does, however, indicate that the fact that a fund is not created or preserved is one of the things to be considered by a court in exercising its discretion in the matter of the allowance of such fees.

In the instant case, we find other circumstances present which were apparently not considered by the court at the time of the hearing in this matter and which should always be considered when the discretionary matter of the allowance of fees is reached. We observe that the rights protected were private rights as opposed to public rights. The action filed was primarily for the benefit of the plaintiff's own interests. No public money or property is involved. The sole purpose of the action was to prevent the municipality from requiring payment of fees by a limited class of property owners, of which plaintiff is a member.

The statute which allows fees directs the court to make such order as the equity of the case demands. It would be inequitable to pay the plaintiff's counsel with public funds in a case in which the public obtains no benefit.

The remedies readily available to the plaintiff in her individual rather than her representative capacity in this case were entirely adequate to protect her interests.

In view of the foregoing, the order allowing plaintiff an attorney fee and taxing it as costs constitutes an abuse of discretion.

The judgment is, therefore, reversed.

Judgment reversed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

APPENDIX B.

Preston Howard et al. v. City of Cleveland et al., Opinion and Judgment of the Court of Appeals, Cuyahoga County, July 17, 1964.

KOVACHY, Presiding Judge.

This is an appeal on questions of law from a judgment of the Court of Common Pleas of Cuyahoga County.

Preston Howard and Lucille Howard brought an action as taxpayers of the City of Cleveland in the Court of Common Pleas to restrain the City, its Finance Director, and the Auditor of Cuyahoga County from enforcing a penalty provision of Ordinance 2428-58, Section 13.0722 of the Codified Ordinances of the City of Cleveland on the grounds that such ordinance was illegal and unconstitutional. The ordinance attempted to impose a fifteen per cent monetary penalty to be added to the cost of making sidewalk repairs by the City and to assess the same against property owners in cases where the property owners failed to repair their sidewalks after receiving due notice from the City in accordance with the provisions of the Charter of the City of Cleveland.

The Court of Common Pleas ruled that the assessment of a fifteen per cent penalty was invalid and illegal and permanently enjoined its levy and assessment against property owners. The ruling was not appealed by the City of Cleveland and, accordingly, the judgment in favor of the taxpayers became final.

Subsequent thereto and in the same case, the plaintiffs filed an application for attorney fees which the trial court allowed in the sum of $3,880.00 and ordered the same to be taxed as additional costs to be paid by the City.

The appeal here is from the judgment entered on this order of the trial court allowing attorney fees and taxing the same as court costs.

The defendant appellant, the City of Cleveland, makes no contest in this court with respect to the reasonableness of the amount of the attorney fees allowed by the trial court. Its sole assignment of error is that:

> "The trial court abused its discretion in awarding attorney fees and taxing the same as court costs in a taxpayer's action against a municipal corporation where no fund was created as a result of the taxpayer's successful prosecution of his action."

The principal action in the lawsuit was brought by the plaintiff appellees by virtue of and under Sections 733.56 to 733.61, inclusive, Revised Code, and Sections 87 to 92, inclusive of the Charter of the City of Cleveland. The language employed in the Charter and the Revised Code is similar. The Statutes read as follows:

> "Section 733.56 Application for injunction.
>
> "The solicitor shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption.
>
> "Section 733.57 Specific performance.
>
> "When an obligation or contract made on behalf of a municipal corporation, granting a right or easement or creating a public duty, is being evaded or violated, the solicitor shall apply for the forfeiture or the specific performance thereof as the nature of the case requires.
>
> "Section 733.58 Mandamus.
>
> "In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined

by law or ordinance, the solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.

"Section 733.59 Suit by taxpayer.

"If the solicitor fails, upon the written request of any taxpayer of such municipal corporation, to make any application provided for in sections 733.56 to 733.58, inclusive, of the Revised Code, such taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no solicitor may bring such a suit on behalf of such municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

"Section 733.60 Limitation of action.

"No action to enjoin the performance of a contract entered into or the payment of any bonds issued by a municipal corporation shall be brought or maintained unless commenced within one year from the date of such contract or bonds.

"Section 733.61 Duty of court.

"If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney."

[1, 2] It is manifest to us from a study of Section 733.61, Revised Code, that the Legislature in actions based on Sections 733.56, 733.57 or 733.58, Revised Code, intended the allowance of attorney fees by a trial court to be permissive only and, as a consequence, a matter resting

entirely within the sound discretion of the court. The language used imposes no restrictions or limitations upon a trial court in the exercise of this function. It necessarily follows, therefore, that the guidelines to be used by the court in determining whether or not the attorney fees should be allowed depends upon the particular facts and the surrounding circumstances of the case before it. In the instant case, the City was attempting to impose a monetary penalty upon certain property owners which the court determined was illegal. Appellees by their action not only prevented such illegal imposition upon themselves but upon many other taxpayers similarly situated as well. The Statutes were enacted to thwart a municipal corporation from exercising such abuse of its corporate powers.

The plaintiffs instituted their action only after the Director of Law (Solicitor) refused to take action requested by them so that it can be said the taxpayers were acting for the Director of Law to forestall the enforcement of an illegal ordinance passed by the Council of the City. Appellant cites two cases as support for its position in this matter: *State ex rel. Scott v. Masterson,* 173 Ohio St. 402, 183 N.E.2d 376; *Grandle v. Rhodes, Aud.,* 169 Ohio St. 77, 157 N.E.2d 336.

The only reference to attorney fees in the case of *State ex rel. Scott v. Masterson, supra,* is found at the bottom of page 406 of 173 Ohio St., page 380 of 183 N.E.2d which reads:

> "Relators pray that attorney fees be awarded to them for the prosecution of this action. Under the provisions of Section 733.61, Revised Code, the court may, when the relator is successful in his action, award attorney fees. This section is permissive and not mandatory, and, inasmuch as no fund has been

> created out of which attorney fees may be allowed, the prayer for attorney fees is denied. Grandle v. Rhodes, Aud., 169 Ohio St. 77, 157 N.E.2d 336."

It is clear from such language, which, however, is mere obiter dictum, that the Supreme Court was not inclined to allow attorney fees under the unusual facts and circumstances of that case. Nothing monetary whatever was involved in the case, and the action was one against thirty-three councilmen in a mandamus action to compel them to redivide the thirty-three wards of the City of Cleveland. It must have been obvious to the Supreme Court that the inaction of Council was the result of political maneuvering, prompted by political considerations and that many of the defendants were innocent victims caught in a web of power politics. The disallowance of attorney fees under such circumstances cannot be considered authority for the proposition that the creation of a fund is sine qua non to the allowance of attorney fees under Section 733.61, Revised Code.

In *Grandle v. Rhodes, Aud., supra,* a claim for allowance of attorney fees was predicated on Section 5a, Article XII of the Constitution of Ohio (page 78 of opinion, 157 N.E.2d 336) and not on a statute as was done here. For that reason alone, it cannot be authority for the contention made by appellant. In that case the taxpayer succeeded in preventing an expenditure of $64,500.00 by the Director of Highways of the State on the ground that the expenditure was not authorized by law. Moreover, the law did not permit the payment of attorney fees from the fund created nor could payment come from the state treasury in view of Section 22 of Article II of the Constitution providing that no payment can be made out of the state treasury unless the same has been specifically appropriated by the General Assembly.

[3] It seems to us that if the appellant's claim that the allowance of attorney fees under Section 733.61, Revised Code, depends upon the creation of a fund in a taxpayer's suit, the provision with respect to attorney fees would be wholly unnecessary since under equitable principles of law a court of equity can award attorney fees to a lawyer responsible for the creation of a fund. This was the situation in Council of *Village of Bedford v. State ex rel. Thompson, Hine & Flory,* 123 Ohio St. 413, 175 N.E. 607, where the Supreme Court in its syllabus stated the law as follows:

> "Where a taxpayer, on behalf of himself and other taxpayers of a village, has successfully prosecuted an action to recover money unlawfully paid by such village, and such money has been restored to the village, such action, while for money only, possesses certain equitable characteristics, and the trial court, out of the fund so created, in the exercise of equitable powers, may allow a reasonable fee to the attorneys of the taxpayer, payable out of the fund so created. * * *" See *Cohen v. Goldberger,* 109 Ohio St. 22, 141 N.E. 656; *State, ex rel. Yontz v. West,* 135 Ohio St. 589, 21 N.E.2d 987.

[4] Moreover, there is established law in Ohio that a trial court has the authority to allow attorney fees under Section 733.61, Revised Code, whether or not a fund is created in a taxpayer's suit brought under the statutes mentioned above.

In the case of *State on Relation of Vlach v. Johnson,* Ohio App., 129 N.E.2d 519, 71 Ohio Law Abst. 80, the headnote reads as follows:

> "An action in mandamus by a taxpayer, under § 733.59, R. C., to compel the clerk to certify referendum petitions relative to an ordinance amending a zoning ordinance to the Board of Elections, she having refused to do so, is a proper taxpayer's suit com-

ing within the scope of § 733.61 R. C., wherein the taxpayer, if the court is satisfied that he had good cause to believe that his allegations were well founded, or if they are sufficient in law, shall be allowed his costs and if judgment is finally ordered in his favor he may be allowed, as part of such costs, a reasonable compensation for his attorney."

In *Brundige v. Village of Ashley*, 62 Ohio St. 526, at page 528, 57 N.E. 226, the Supreme Court in a case where no fund was created, disallowed attorney fees on the grounds that the village had no solicitor, saying:

"If there is a solicitor, and no such request is made upon him, there can be no compensation for the attorney included in the costs allowed to plaintiff; and if there is no solicitor the same result must follow, because it is the request and refusal that warrants the allowance of such fees."

[5, 6] We conclude and, therefore, hold that where a taxpayer brings an action under and by virtue of the authority granted him in Section 733.59, Revised Code, bases such action on Sections 733.56, 733.57, or 733.58, Revised Code, and the solicitor of a Municipal Corporation, upon request of the taxpayer, refuses to bring the action, the trial court, under authority of Section 733.61, Revised Code, has the discretion to allow reasonable compensation for the taxpayer's attorney to be taxed as costs, provided a judgment is finally ordered in the taxpayer's favor and irrespective of whether a fund is created; and, where such compensation has been allowed, a reviewing court will not disturb the same unless a clear abuse of discretion is shown by the record before it.

Under the facts and circumstances of this case no such showing has been made to appear, and the judgment, accordingly, is affirmed.

Judgment affirmed. Exceptions noted.

ARTL and CORRIGAN, *JJ.*, concur.

APPENDIX C.

Order of the Supreme Court of Ohio, July 6, 1966, Brauer vs. City of Cleveland, et al., No. 39,983.

This cause here on appeal from the Court of Appeals of Cuyahoga County was heard in the manner prescribed by law. On consideration thereof the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed here.

It is ORDERED AND ADJUDGED also that appellant recover from the Appellee its costs expended in this Court.

That a mandate be sent to the Common Pleas Court to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

Order of the Supreme Court of Ohio, July 6, 1966, Howard vs. City of Cleveland, et al., No. 40,155.

This cause here on appeal from the Court of Appeals of Cuyahoga County was heard in the manner prescribed by law. On consideration thereof the judgment of the Court of Appeals is reversed on authority of Brauer vs. City of Cleveland et al., this day decided.

It is ORDERED AND ADJUDGED also that appellant recover from the Appellee its costs expended in this Court.

That a mandate be sent to the Common Pleas Court to carry this judgment into execution and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

Orders on Denial of Rehearing.

Brauer vs. City of Cleveland, Case No. 39933; 1966 Term; Sept. 28, 1966; Rehearing.

It is ordered that the rehearing in this case be denied.

THOS. L. STARTZMAN, *Clerk.*

Howard vs. City of Cleveland, Case No. 40155; 1966 Term; Sept. 28, 1966; Rehearing.

It is ordered that the rehearing in this case be denied.

THOS. L. STARTZMAN, *Clerk.*

APPENDIX D.

Amendment 5, United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, United States Constitution.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E.

Article II, Section 1, Ohio Constitution.

"The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the General Assembly, except as hereinafter provided; and independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the General Assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

APPENDIX F.

Ohio Revised Code, Sections 733.56-733.61, Inclusive.

733.56 Application for injunction.

The solicitor shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption.

733.57 Specific performance.

When an obligation or contract made on behalf of a municipal corporation, granting a right or easement or creating a public duty, is being evaded or violated, the solicitor shall apply for the forfeiture or the specific performance thereof as the nature of the case requires.

733.58 Mandamus.

In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.

733.581 Taxpayer as defendant in certain actions; intervention.

If the city solicitor, upon the written request of any taxpayer of the municipal corporation, makes any application provided for by sections 733.56, 733.57, or 733.58 of the Revised Code, such taxpayer may be named as a party defendant and if so named shall have the right to assist in

presenting all issues of law and fact to the court in order that a full and complete adjudication of the controversy may be had.

In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered.

733.59 Suit by taxpayer.

If the solicitor fails, upon the written request of any taxpayer of such municipal corporation, to make any application provided for in sections 733.56 to 733.58, inclusive, of the Revised Code, such taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no solicitor may bring such suit on behalf of such municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

733.60 Limitation of action.

No action to enjoin the performance of a contract entered into or the payment of any bonds issued by a municipal corporation shall be brought or maintained unless commenced within one year from the date of such contract or bonds.

733.61 Duty of Court.

If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney.

Ohio Revised Code § 2505.29: No appeal filed without leave of Supreme Court; exceptions:

No appeal shall be filed in the Supreme Court unless such Court or a judge thereof grants leave to file such an appeal. Such leave need not be obtained to file an appeal as to the judgment or final order of the Court of appeals, or a judge thereof, in cases involving questions under the constitution of the United States, or of this state, in cases which originated in the court of appeals, and as to proceedings of administrative officers as may be provided by law.

APPENDIX G.

Charter of the City of Cleveland, Chapter 15, Sections 87 to 90, incl., and 92, Effective November 9, 1931.

CHAPTER 15

DEPARTMENT OF LAW

§ 87 Application for Injunction.

The director of law shall apply in the name of the city, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the city, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the city in contravention of law, or which was procured by fraud or corruption.

§ 88 City Contracts, Easements.

When an obligation or contract made on behalf of the city, granting a right or easement, or creating a public duty, is being evaded or violated, the director of law shall likewise apply for the forfeiture or the specific performance thereof as the nature of the case requires.

§ 89 Mandamus.

In case any officer or commission fail to perform any duty required by law, the director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.

§ 90 Taxpayer's Suit.

In case the director of law, upon written request of any taxpayer of the city, fails to make any application provided for in the preceding three sections, such taxpayer may institute suit or proceedings for such purpose in his own name on behalf of the city. No such suit or proceeding shall be entertained by any court until such request to the director of law shall first have been made, nor until the taxpayer shall have given security for the costs of the proceedings.

§ 92 Hearing, Judgment, Costs.

If the court hearing any such action be satisfied that the taxpayer had good cause to believe his allegations were well founded, or that they are sufficient in law, it shall make such order as the equity and justice of the case demand. In such case the taxpayer shall be allowed his costs, and if judgment be finally entered in his favor, he may be allowed as part of the costs a reasonable compensation for his attorney.

APPENDIX H.

Supreme Court of Ohio Rules of Practice, Rule II, Sections 9 and 10.

RULE II.

DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEAL.

Section 9. Record Not to be Sent to Supreme Court Until Appeal Allowed.

Except in those cases originating in the Court of Appeals, unless otherwise ordered and notwithstanding Section 2505.08, Revised Code, neither the original papers nor the bill of exceptions shall be transmitted to the Supreme Court, unless and until a motion to certify the record has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule.

Section 10. Record to be Sent to Supreme Court After Jurisdiction Determined.

Upon the allowance of a motion to certify the record or for leave to appeal or, in the case of a claimed appeal as of right, on the overruling of the motion to dismiss referred to in Section 3 of this rule, the Clerk of this Court shall issue an order to the Court of Appeals requiring the clerk of that court to prepare a transcript of the docket and journal entries in said cause in said court, upon being paid by the appellant the lawful fees therefor, and to transmit said transcript and all the papers in the case, duly certified, to the Clerk of the Supreme Court within ten days.